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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(**HONORABLE THOMAS J. WHELAN**)

UNITED STATES OF AMERICA, Plaintiff, v. NICOLAS CESAREO, Defendant.	CASE NO. 08CR0201-W DATE: May 12, 2008 TIME: 2:00 p.m. STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTIONS

I.

STATEMENT OF FACTS[1]

A. Procedural History

On November 19, 207, agents arrested Mr. Cesareo on suspicion of illegal reentry. On January 23, 2008, the government secured a one count indictment against Mr. Cesareo. In this

[1] Facts referred to in this memorandum are based on information provided by the government. Mr. Cesareo does not admit their accuracy and reserves the right to challenge them.

one-count indictment, the government has charged Mr. Cesareo with attempted entry after deportation under 8 U.S.C. Section 1326. The Motion Hearing Date was set for March 24, 2008. At that hearing date, Mr. Cesareo requested an order from the Court to require that the government allow Mr. Cesareo to review his A-File. The Court ordered the government to allow Mr. Cesareo to review the A-File and continued the motion hearing to May 12, 2008, at the request of counsel.

B. Illegal Reentry After Deportation Allegation

Prior to the A-File viewing, Mr. Cesareo had not received any discovery establishing that Mr. Cesareo was ever deported following an immigration hearing. The A-File viewing confirmed that in fact Mr. Cesareo has never been before an immigration judge.

Based on the discovery provided by the government, however, it appears that the government will allege that Mr. Cesareo was ordered deported by an immigration judge ***without ever receiving any hearing*** based on a Stipulated Order of Removal in 2005 and that order was subsequently reinstated. See September 22, 2005 Decision and Order of the Immigration Judge attached hereto as Exhibit A; See also September 21, 2005 Stipulated Request for Removal attached hereto as Exhibit B. The Stipulated Request for Removal was signed by Mr. Cesareo when he was only 18 year old and had no adult convictions. Id. He was alone with two immigration officers without counsel. Id. According to the Stipulation, Mr. Cesareo "understood" the allegations in the Notice to Appear, which alleged he was not a citizen and entered the United States without being admitted or paroled on or about January 1992 – when Mr. Cesareo was five years old. See Notice to Appear attached hereto as Exhibit C. In the uncounseled Stipulation Mr. Cesareo waived his right to representation, his right to a hearing by an immigration judge, his right to appeal, and his right to any possible relief from deportation. See Exhibit B. The subsequent order by the immigration judge references that Stipulation without any independent inquiry as to whether it was entered knowingly and intelligently – as is required by regulation – and accepts Mr. Cesareo's complete waiver of all his rights and deports him to Mexico. See Exhibit A. There is no evidence nor any allegation that Mr. Cesareo had any adult convictions prior to the order of deportation.

It is Mr. Cesareo's position that the indictment must be dismissed based on several reasons. First, the 2005 immigration judge's order of deportation – the only order of deportation as to Mr. Cesareo – violates the provisions of the immigration statute. Second, any order of removal or summary disposition of Mr. Cesareo's case would be based on a 2005 order without a hearing before an IJ in which Mr. Cesareo was prejudiced by the IJ's violation of his due process rights.

II.

THE IMMIGRATION JUDGE'S ORDER OF DEPORTATION FAILED TO COMPLY WITH THE INA REGULATIONS AND VIOLATED MR. CESAREO'S DUE PROCESS RIGHTS SUCH THAT THE 1326 INDICTMENT MUST BE DISMISSED.

A. Introduction: The Supreme Court Requires that a Prior Deportation Comport with the Requirements of Due Process Prior to Enforcement of Criminal Enhancements.

The Supreme Court in United States v. Mendoza-Lopez, 481 U.S. 828 (1987) clearly placed due process limits on the use of administrative decisions to enhance criminal penalties by holding that "[i]f a statute envisions that a court may impose a criminal penalty for reentry after *any* deportation, regardless of how violative of the rights of the alien the deportation proceeding may have been, the statute does not comport with the constitutional requirement of due process." 481 U.S. at 837. Consequently, due process requires criminal defendants must be afforded an opportunity to challenge collaterally the validity of their underlying deportations for use in criminal cases.

As Congress later codified Mendoza-Lopez, such a collateral attack will succeed where the defendant can show that (1) he administratively appealed his deportation order (8 U.S.C. § 1326(d)(1)), (2) that he was deprived of judicial review of the deportation (8 U.S.C. § 1326(d)(2)), and (3) that entry of the deportation order was fundamentally unfair (8 U.S.C. § 1326(d)(3)). Entry of a deportation order is fundamentally unfair when the defendant's due process rights were violated by a defect in the deportation proceeding and the defect prejudiced

him. United States v. Pallares-Galan, 359 F.3d 1088, 1096 (9th Cir. 2004) (citing United States v. Leon-Paz, 340 F.3d 1003, 1007 (9th Cir. 2003)); United States v. Ubaldo-Figueroa, 364 F.3d 1042, 1050 (9th Cir. 2003) (citation omitted).

Importantly, although Mr. Cesareo carries the initial burden on the issue of prejudice, once Mr. Ceseareo makes a prima facie showing of prejudice, *the burden shifts to the government to demonstrate that the procedural violation could not have changed the proceedings outcome*. United States v. Valerio, 342 F.3d1051, 1054 (9th Cir. 2003) (emphasis added).

For reasons of analytic clarity, the above requirements will be discussed in the following order: violation of due process rights, prejudice, exhaustion, and deprivation of judicial review.

B. DUE PROCESS VIOLATION: Mr. Cesareo's 2005 Deportation is Invalid Because It Did Not Comply with Removal Proceedings Codified in the Immigration and Naturalization Act.

1. There was a defect in order because the IJ never made an independent determination as to whether Mr. Cesareo's waiver was voluntary, knowing and intelligent

A person can be removed by signing a stipulation that concedes his "removability," if the government complies with the regulations governing this procedure. See 8 U.S.C § 1229a. The statute specifically requires that the Attorney General provides by regulation a procedure for effectuating a "stipulated removal." 8 U.S.C. § 1229a(d). This procedure is currently found in 8 C.F.R. § 1003.25(b). The regulations delineate numerous requirements that the stipulation must contain. One of these requirements is that the stipulation include a "statement that the alien understands the consequences of the stipulated request and that the alien enters the request voluntarily, knowingly and intelligently...." 8 C.F.R. § 1003.25(b)(6). In addition to this requirement, if "the alien is unrepresented, *the Immigration Judge must determine* that the alien's waiver is voluntary, knowing and intelligent." 8 C.F.R. § 1003.25(b) (emphasis added).

The plain language and structure of the regulation make clear that a statement *in the stipulation* is insufficient alone to sustain a determination by the immigration judge that a person knowingly, voluntarily and intelligently entered into the waiver of a hearing and its attendant procedural protections. If a statement in the stipulation was a conclusive determination that the request was voluntary, knowing, and intelligent, there would be no need for the additional language that the *immigration judge* must ***independently*** determine that the waiver meets these criteria of voluntariness, where the alien is unrepresented.

There is no evidence whatsoever that such independent determination was made by the immigration judge. See Exhibit A. The IJ's order makes no reference to a finding that Mr. Cesareo's signed stipulation was knowing and voluntary. See id. When no such independent inquiry is made to confirm that a written waiver is indeed voluntary, knowing and intelligent, a stipulated removal is not valid as in violation of mandatory regulations governing the procedure. Several unpublished decisions by the Board of Immigration Appeals have remanded stipulated deportation orders precisely because the immigration judge made an inadequate inquiry into the voluntariness of the stipulation. See, e.g., In re Medrano-Umanzor, 2006 WL 3088805 (BIA 2006) (per curiam); In re Lagunes-Huerta, 2005 WL 3709274 (BIA 2005) (per curiam) (remanding to the IJ because the "Decision and Order of the Immigration Judge" did not address the regulatory requirement that it independently determine if the stipulation was entered into knowingly, intelligently, and voluntary); see also In re Young, 2006 WL 3485805 (BIA 2006) (per curiam) (immigration judge properly found stipulation voluntary because signed in judge's presence).[2] In United States v. Vasquez-Villegas, 2006 WL 2546714 (E.D. Wash. Sept. 1, 2006) (unpublished) the defendant argued that the deportation without an IJ hearing was invalid because there was no evidence that the IJ entered into this independent determination that the defendant made the waiver voluntarily. The government conceded this issue and the district court dismissed the indictment accordingly.[3]

Furthermore, it cannot be said that Mr. Cesareo fully understood the consequences of the stipulated order of deportation. Mr. Cesareo, an English Language Learner who never completed high school, signed the legal document stipulating to his deportation when he was only 18 years of age.[4] He acted pro se and without any consultation from a guardian or an independent agent. Instead, it appears that he signed the legal document in the presence of two immigration officers, no one else. According, to the document this 18-year-old English Learner high-school-drop-out knowingly and intelligently understood the following statements:

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[2]A copy of the BIA unpublished decisions is attached hereto as ***Exhibit D***.

[3]A copy of the district court unpublished decisions is attached hereto as ***Exhibit E***.

- "I understand that I have the following rights and privileges and that by signing this stipulated request for removal, I will be surrendering these rights and privileges."
- "I hereby waive my right to be represented in this proceeding. I will represent myself in this proceeding."
- "I understand ... [that] relief may include, but is not limited to, voluntary departure, asylum, withholding or [stet] removal, relief under Article 3 of the Convention Against Torture, adjustment of status, change of status, suspension or cancellation of removal, registry, and any waivers of removability. I do not want to apply for any relief for which I may be eligible."
- "I understand and agree to accept a written order for my removal as a final disposition of these proceedings. I waive my right to appeal the written order of the Immigration Judge."

See Exhibit B. Without the consultation of counsel or other independent agent it is difficult to understand how Mr. Cesareo could have "knowingly" and "intelligently" understood and signed this legal document. Moreover, as explained below, nothing in this stipulated removal actually explains to Mr. Cesareo whether he qualified for any of the enumerated reliefs or any other relief. Instead, the stipulation just provides a long list of reliefs from deportation, without any explanation of how any of them would apply to Mr. Cesareo.

Because deportation "visits a great hardship on the individual and deprives him the right to stay and work in this land of freedom[,] ... [m]eticulous care must be exercised lest the procedure by which [an alien] is deprived of that liberty not meet the essential standards of fairness." Bridges v. Wixon, 326 U.S. 135, 154 (1945). Accordingly, the burden lies with the prosecution to demonstrate that the waiver of rights in a stipulated removal was voluntary, knowing, and intelligent. See United States v. Lopez-Vasquez, 1 F.3d 751, 753 (9th Cir. 1993) (per curiam) (citing Brewer v. Williams, 430 U.S. 387, 404 (1977) ("it [is] incumbent on the State to prove 'an intentional relinquishment or abandonment of a known right or privilege.'"). "Courts should 'indulge every reasonable presumption against waiver,' and they should 'not presume acquiescence in the loss of fundamental rights."' Barker v. Wingo, 407 U.S. 514, 525 (1972) (citations omitted).

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[4]Nor can it be said that the Spanish language translation of the document some how better informed Mr. Cesareo of his rights. Mr. Cesareo came to the United States when he was in elementary school and received most of his schooling as an English Learner.

The provisions of 8 C.F.R. § 1003.25(b) mandate that the immigration judge "determine that the alien's waiver is voluntary, knowing and intelligent," *in addition to* requiring that the written stipulation contain such a statement. See 8 C.F.R. § 1003.25(b)(6). This additional requirement appeared when the regulation was changed to permit uncounseled aliens to stipulate to removal. Compare 8 C.F.R. § 1003.25 (2006) with 8 C.F.R. § 3.25 (1997). Thus, in order to protect the due process rights of removable aliens, the regulation calls for *both* written notice and independent inquiry by the immigration judge.

An agency's failure to afford the basics of due process under its own regulations can result in the invalidation of the ultimate administrative determination. See, e.g., Montilla v. INS, 926 F.2d 162, 168-70 (2nd Cir. 1991) (alien claiming that INS failed to adhere to regulations regarding right to counsel at deportation warranted remand on sole basis that regulations promulgated for alien's benefit were not adhered to). This principle is rooted in United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954), where the Supreme Court vacated a deportation order issued by the BIA because the procedures leading to the order violated the regulations promulgated by the INS. In Accardi, the Supreme Court recognized that "[a]n agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down." United States v. Heffner, 420 F.2d 809, 811 (4th Cir. 1969) (reversing for admission of statement in tax fraud case which was taken by IRS agent in violation of regulations established to protect constitutional rights of suspects).

Here, absolutely no evidence indicates that the immigration judge did anything to determine independently that the stipulation was knowing, voluntary, and intelligent beyond accepting the statement in the written stipulation itself as true. Thus, the order must be found to be an invalid deportation. The immigration judge's failure to make independent inquiry into voluntariness, as required by the regulations, deprived Mr. Cesareo of a valuable protection against arbitrary actions by the government. As "[a]n agency of the government" failed to observe rules established to protect the due process of people like Mr. Cesareo, the "action cannot stand and courts will strike it down." Heffner, 420 F.2d at 811, citing Accardi. The stipulated deportation here was deficient for its violation of 8 C.F.R. § 1003 .25(b), and therefore it cannot serve as a valid predicate removal for purposes of sentence enhancement under § 1326.

2. There was a defect in order because the IJ never informed Mr. Cesareo of his eligibility for relief.

A deportation hearing is defective if the alien is eligible for relief from deportation but the immigration judge does not tell him so. See United States v. Muro-Inclan, 249 F.3d 1180, 1183-84 (9th Cir. 2001) (citation omitted) (same); see also Pallares-Galan, 359 F.3d at 1103 (cancellation of removal under 8 U.S.C. § 1229b); United States v Arrieta, 224 F.3d 1076, 1079 (9th Cir. 2000) (relief from deportation under 8 U.S.C. § 1182(h)).

It might seem strange that an immigration judge is required to tell an alien about relief from deportation. A district court is not required to tell a defendant in criminal proceedings about potential defenses, and it is perhaps tempting to analogize a deportation proceeding to a criminal proceeding in district court. But the analogy is improper. A defendant in criminal proceedings and an alien in immigration proceedings are not on the same footing.

A criminal defendant has the right to counsel; an alien does not. Yet immigration law is an extremely difficult body of law for a lay person to master. It is as Byzantine as the tax code. Castro-O'Ryan v. INS, 847 F.2d 1307, 1312 (9th Cir. 1988). See also Drax v. Reno, 338 F.3d 98, 99 (2d Cir. 2003) (describing immigration jurisprudence as "this dark thicket of the law," noting the "inscrutability of the current immigration law system," and characterizing its "labyrinthine" nature as "a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike"). For this reason, the immigration judge in a deportation case is not a neutral umpire. His role is different from that of a district court judge.

Immigration judges are expected to be experts in immigration law. Moran-Enriquez v. INS, 884 F.2d 420, 423 (9th Cir. 1989) (immigration judges expected to be "intimately familiar with immigration laws"). The aliens who appear before them are not. Every immigration judge, therefore, " shall inform the [alien] of his or her apparent eligibility to apply for any of [these] benefits and shall afford the [alien] an opportunity to make application therefore during the hearing." 8 C.F.R. § 242.17(a) (1994) (emphasis added). The regulations require the judge to identify available relief and tell the alien, "You should apply for this," precisely because of the likely limitations on the alien's ability effectively to represent himself. In a criminal case, this is counsel's responsibility, but in an immigration case, the obligation rests with the judge.

Mr. Cesareo's deportation order was defective because the immigration judge did not perform his mandatory duty: He did not tell Mr. Cesareo that he had an avenue for relief from deportation under § 1229c of the Immigration and Naturalization Act. 8 U.S.C. § 1229c(a). Pre-hearing voluntary departure under 8 U.S.C. § 1229c(a) gives immigration judges "broad authority to grant [pre-hearing] voluntary departure," In re Eloy Arguelles-Campos, 22 I. & N. Dec. 811, 820 (BIA 1999), and only two classes of immigrants are ineligible for such relief, "those involved in terrorism-related activity [not at issue here], and those ... convicted of an aggravated felony [also not an issue here]." In United States v. Ortiz-Lopez, 385 F.3d 1202 (9th Cir. 2004), the Ninth Circuit Court of Appeals recognized that an immigration judge is required to inform the alien of the option for voluntary departure so long as the alien is not barred from such departure. If the immigration judge fails to meet this requirement such a deportation cannot serve as a predicate to a 1326 criminal conviction. Mr. Cesareo qualified for voluntary departure. Mr. Cesareo did not have any adult convictions prior to this 2005 stipulated removal. The government may contend that Mr. Cesareo had prior juvenile delinquency matters. The BIA, however, has consistently held that "juvenile delinquency proceedings are not criminal proceedings, that acts of juvenile delinquency are not crimes, and that findings of juvenile delinquency are not convictions for immigration purposes." In re Devison-Charles, 22 I. & N. Dec. 1362, 1365 (BIA 2000). Accordingly, a juvenile delinquency adjudication cannot qualify as an aggravated felony that bars voluntary departure relief.

3. *Mr. Cesareo was prejudiced by the defect in his deportation "proceeding."*

The prejudice requirement in collaterally attacking the deportation in this case is not overly burdensome. To obtain relief, the defendant need only demonstrate that he had a plausible relief from deportation. See Arrieta, 224 F.3d at 1079. So long as there was a possibility that had there been a hearing before an immigration judge and that judge would have granted voluntary departure to Mr. Cesareo, the prejudice requirement is met.

As noted above, looking at the requirements of 1229c(a), Mr. Cesareo did qualify for voluntary departure and should have been properly advised of such a relief.

C. Mr. Cesareo Was Not Required to Exhaust Because His Waiver Was Not Considered or Intelligent

Mr. Cesareo did not, apparently, administratively appeal his deportation order, as 8 U.S.C. § 1326(d)(1) would appear to require. But even so, Mr. Cesareo is not barred from collaterally attacking his deportation. This Court has consistently interpreted § 1326(d)(1) in light of the Supreme Court's decision in Mendoza-Lopez. Under Mendoza-Lopez, a failure to appeal does not matter in a case like this. That is because an alien's waiver of appeal must be both "considered and intelligent." Mendoza-Lopez, 481 U.S. at 840. If it is not considered and intelligent, the waiver violates the alien's due process rights and is invalid. Id.

An alien cannot waive his right to appeal in a considered and intelligent way if he does not know that he is eligible for relief from deportation. See Arrieta, 224 F.3d at 1079 (defendant's waiver of appeal of deportation order was invalid; immigration judge never told him of eligibility for relief from deportation under 8 U.S.C. § 212(h)). For this reason, the Ninth Circuit Court of

Appeals has repeatedly found a waiver of appellate rights invalid where an immigration judge failed to tell an alien of a possible ground for relief See, e.g., Pallares-Galan, 359 F.3d at 1096; Ubaldo-Figueroa, 364 F.3d at 1049-50; Arrieta, 224 F.3d at 1079. Indeed, the Court of Appeals has explicitly stated that an alien's waiver is not considered and intelligent "when the record contains an inference that [he] is eligible for relief from deportation, but the Immigration Judge fails to advise [him] of this possibility and give him the opportunity to develop the issue." Muro-Inclan, 249 F.3d at 1182; see also Leon-Paz, 340 F.3d at 1005 (same; quoting Muro-Inclan). Moreover, as noted above, the immigration judge failed to make any independent finding as to whether the waiver of appeal signed by Mr. Cesareo was knowing and intelligent.

Like the defendants in the cases cited above, Mr. Cesareo made an unconsidered and uninformed appellate waiver. The immigration judge never told him that he should apply for voluntary departure relief. Believing that he was doomed to be deported, Mr. Cesareo did not appeal. Thus, he waived his administrative appellate rights without ever having received the critical advice that he needed to make his waiver considered and intelligent. For this reason, under Mendoza-Lopez, Mr. Cesareo is not required to have exhausted his administrative remedies.

D. Mr. Cesareo Was Deprived of a Meaningful Opportunity for Judicial Review

An alien has been deprived of a meaningful opportunity for judicial review if he entered a defective waiver of his right to administratively appeal his deportation order. Ubaldo-Figueroa, 364 F.3d at 1050 (defendant deprived of opportunity of judicial review where waiver of right to appeal was not considered and intelligent; immigration judge did not translate advisement of right into Spanish) (citation omitted). That is because "an alien who is not made aware that he has a right to seek relief necessarily has no meaningful opportunity to appeal the fact that he was not advised of that right." Arrieta, 224 F.3d at 1079 (citation omitted); see also United States v. Arce-Hernandez, 163 F.3d 559, 563 (9th Cir. 1999) (same).

IV.

CONCLUSION

Mr. Cesareo requests that this Court grant his motions.

Respectfully submitted,

//s// Zandra L. Lopez

Dated: April 29, 2008

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